

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
)	
GA-MEX Broadcasting, Inc.,)	File No. EB-01-IH-0411
)	FRN 0004-3293-97
Licensee of Station WAZX(AM))	Facility ID # 22983
Smyrna, Georgia)	
)	File No. EB-01-IH-0411
)	FRN 0004-3294-05
WAZX-FM, Inc.,)	Facility ID # 71198
)	
Licensee of Station WAZX(FM),)	NAL/Acct. No. 200232080011
Cleveland, Georgia)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: April 30, 2002

Released: May 1, 2002

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that GA-MEX Broadcasting, Inc., licensee of station WAZX(AM), Smyrna, Georgia and WAZX-FM, Inc., licensee of station WAZX(FM), Cleveland, Georgia (collectively referred to as "WAZX"), apparently violated 18 U.S.C. § 1464 and 47 C.F.R. § 73.3999 by willfully broadcasting indecent language.¹ Based upon our review of the facts and circumstances in this case, we conclude that WAZX is apparently liable for a forfeiture in the amount of seven thousand dollars (\$7,000).

II. BACKGROUND

2. The Commission received a complaint alleging that WAZX broadcast indecent material during the Spanish-language call-in talk show "el Manero" on April 6, 2001, between 8:00 a.m. and 10:00 p.m. The complainants submitted an audio-tape of the broadcast. After reviewing the complaint, we issued a *Letter of Inquiry* to WAZX, attaching a copy of the audio-tape and transcript (in English), and asking the licensee whether it broadcast the material at issue and whether the transcript (as translated) accurately reflects the broadcast materials.

3. The subject of the morning broadcast focused on teenage sex and masturbation, with the discussion being led by Claudia P. Morales, a licensed psychologist, and two on-air personalities that provided commentary and jokes with taped studio laughter. The station's on-air personalities made the following statements during the broadcast:

¹ The program was simulcast on WAZX's AM and FM stations.

DJ3: “That reminds [me] of a little kid joke. There is a little kid that tells his mother: ‘Mom, Mom I need to pee I want Grandpa to take me [to] the bathroom.’ His mother responds, ‘wait until your brother can take you.’ The kid screams out, ‘No I want it to be my Grandpa.’ The mother asks, ‘Why does it have to be your grandpa?’ The child responds, ‘because his hand shakes.’”

DJ2: “The benefits of having Parkinson’s Disease.”

* * * * *

DJ3: “Since we are talking about adults. There was a young man that had lots of blemishes, and he asked his friend what to do about them. The friend told him to take his girlfriend to the movie and excite her a lot. Put in your hand, well you know where, and then you clean your face with it. When your hand is nice and wet then you pass it over your face. He did this and when he came out everyone started screaming.” “He’s injured, he’s injured.”

DJ1: “Why, was she menstruating?”

DJ3: “Yes, the girl was menstruating.”

* * * * *

DJ2: “There’s the bicycle technique. Did they ever tell you about that one? You take your penis put it in between your legs, squeeze it between your legs and then you start moving your legs like you’re pedaling.”

4. WAZX filed a response to our inquiry on November 16, 2001 in which it admits that it broadcast the material in question and acknowledges that the translation of the broadcast is essentially accurate with exceptions not relevant to our determination here. WAZX does not deny that it broadcast the material between the hours of 6 a.m. and 10 p.m. WAZX maintains in its response that the premise of the weekly show was to address sexual issues/topics by having a licensed psychologist respond to on-air call-in questions with “comments and humor [provided] from the on-air personalities.” WAZX argues that “it is typical in...Latin culture to attempt to make light of or fun of otherwise serious topics.” Thus, “the goal...was to have fun and cause laughter.” Nevertheless, WAZX states that it had already concluded, prior to receiving the Commission’s *Letter of Inquiry*, “that the strong content and behavior of the program’s on-air personalities was not appropriate for the stations’ audience and was not in accord with the internal broadcasting policy of WAZX...” Further, WAZX notes that “the overall tenor of the show was approaching the limit of good taste” and it had therefore canceled the program. Lastly, WAZX states that it “regrets the broadcast of the specific programming...occurred” and that it has “taken steps to ensure that similar questionable programming is not broadcast in the future.”

III. DISCUSSION

5. It is a violation of federal law to broadcast obscene or indecent programming. Specifically, Title 18 of the United States Code, Section 1464 (18 U.S.C. § 1464), prohibits the utterance of “any obscene, indecent or profane language by means of radio communication.” Congress has given the Federal Communications Commission the responsibility for administratively enforcing 18 U.S.C. § 1464.

In doing so, the Commission may, among other things, impose a monetary forfeiture, pursuant to Section 503(b)(1) of the Communications Act (the “Act”), 47 U.S.C. § 503(b)(1), for broadcast of indecent material in violation of 18 U.S.C. § 1464. Federal courts have upheld Congress’s authority to regulate obscene speech and, to a limited extent, indecent speech. Specifically, the U.S. Supreme Court has determined that obscene speech is not entitled to First Amendment protection. Accordingly, Congress may prohibit the broadcast of obscene speech at any time.² In contrast, federal courts have held that indecent speech is protected by the First Amendment.³ Nonetheless, the federal courts consistently have upheld Congress’s authority to regulate the broadcast of indecent speech, as well as the Commission’s interpretation and implementation of the statute.⁴ However, the First Amendment is a critical constitutional limitation that demands we proceed cautiously and with appropriate restraint.⁵ Consistent with a subsequent statute and case law,⁶ under the Commission’s rules, no radio or television licensee shall broadcast obscene material at any time, or broadcast indecent material during the period 6 a.m. through 10 p.m. See 47 C.F.R. § 73.3999.

6. In enforcing its indecency rule, the Commission has defined indecent speech as language that first, in context, depicts or describes sexual or excretory activities or organs. Second, the broadcast must be “patently offensive as measured by contemporary community standards for the broadcast medium.” *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987) (subsequent history omitted) (citing *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975), *aff’d sub nom. FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)). This definition has been specifically upheld by the federal courts.⁷ The Commission’s authority to restrict the broadcast of indecent material extends to times when there is a reasonable risk that children may be in the audience. *ACT I, supra*. As noted above, current law holds that such times begin at 6 a.m. and conclude at 10 p.m.⁸

7. The Commission’s indecency enforcement is based on complaints from the public. Once a

² See *Miller v. California*, 413 U.S. 15 (1973), *rehearing denied*, 414 U.S. 881 (1973); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

³ *Sable Communications of California, Inc. v. FCC, supra* note 2, 492 U.S. at 126.

⁴ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See also *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (“*ACT I*”); *Action for Children’s Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), *cert denied*, 112 S.Ct. 1282 (1992) (“*ACT II*”); *Action for Children’s Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert denied*, 116 S.Ct. 701 (1996) (“*ACT III*”).

⁵ *ACT I, supra* note 4, 852 F.2d at 1344 (“Broadcast material that is indecent but not obscene is protected by the first amendment; the FCC may regulate such material only with due respect for the high value our Constitution places on freedom and choice in what people say and hear.”). See also *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813-15 (2000).

⁶ Public Telecommunications Act of 1992, Pub. L. No. 356, 102nd Cong., 2nd Sess. (1992); *ACT III, supra* note 4.

⁷ In *FCC v. Pacifica Foundation*, the Court quoted the Commission’s definition of indecency with apparent approval. *FCC v. Pacifica Foundation, supra* note 4, 438 U.S. at 732. In addition, the D.C. Circuit Court of Appeals upheld the definition against constitutional challenges. *ACT I, supra* note 4, 852 F.2d at 1339; *ACT II, supra* note 4, 932 F.2d at 1508; *ACT III, supra* note 4, 58 F.3d at 657.

⁸ *ACT III, supra* note 4.

complaint is before the Commission, we evaluate the facts of the particular case and apply the standards developed through Commission case law and upheld by the courts. See *Industry Guidance on the Commission's Case law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency* ("Indecency Policy Statement"), 16 FCC Rcd 7999, 8015, ¶ 24 (2001). "Given the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming." *Id.*

8. The jokes and commentary in the broadcast quoted above, in context, refer to sexual or excretory activity or organs (including the sexual organs of a child). Accordingly, the material warrants scrutiny in order to determine whether it is patently offensive. In making this determination, three factors are particularly relevant: (1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material appears to pander or is used to titillate or shock. See *Indecency Policy Statement, supra*, 16 FCC Rcd at 8003 ¶ 10.

9. With respect to the first key factor, we find that the sexual references in the broadcast, one of which involves a child, are explicit and graphic. It is of no consequence that the jokes did not explicitly refer to a sexual organ or sexual activity. The Commission has repeatedly held that "innuendo may be patently offensive within the meaning of our indecency definition if it is understandable and clearly capable of a specific sexual or excretory meaning, which, in context, is inescapable."⁹ Although the jokes consisted of innuendo and indirect sexual references, not only was the language understandable and clearly capable of a specific sexual meaning but also, because of the context, the sexual import was inescapable.¹⁰ Indeed, the reference to menstruation following the second of the two jokes quoted above removes any doubt as to what was meant. The comment regarding masturbation was explicit and graphic.

10. Furthermore, with respect to the second and third factors, we find that the sexual references are not isolated and they appear to be used to shock, pander or titillate. WAZX suggests that the presence of a licensed psychologist participating in the discussion provided an informational/educational atmosphere in which teenage sex and masturbation could be discussed, with the hosts simply adding humor to an otherwise serious topic. We reject this assertion based on the overall context of the comments and discussion engaged in by the on-air personalities. While the psychologist offered a relatively serious discussion of teenage sex, the on-air personalities repeatedly undermined and muted the supposed informational purpose of the program by joking about sexual activities and organs in a patently offensive manner.¹¹ While the use of certain terms does not automatically make material indecent, we believe that the graphic sexual references, as well as the announcer's comments, laughter, and jokes, show that the material was offered in a pandering and titillating manner, rendering the material patently

⁹ *Citicasters Co. KSJO(FM)*, 15 FCC Rcd at 19092, citing *San Francisco Century Broadcasting, L.P.*, 8 FCC Rcd 498 (1993).

¹⁰ See, e.g., *KGB, Inc., (KGB-FM)*, 7 FCC Rcd 3207 (1992), *forfeiture reduced* 13 FCC Rcd 16396 (1998) ("Candy Wrapper" song, which includes lyrics such as "my Butterfinger went up her tight little Kit Kat"). See also, *Great American Television and Radio Company, Inc. (WFBQ(FM)/WNDE(AM))*, 6 FCC Rcd 3692, 3693 (MMB 1990); *WIOD, Inc. (WIOD(AM))*, 6 FCC Rcd 3704 (MMB 1989).

¹¹ *Indecency Policy Statement*, 16 FCC Rcd at 8009.

offensive.¹²

11. The context in which material is offered is essential to making a determination as to whether material is indecent. For example, in a case concerning an episode on the “Geraldo Rivera Show” entitled “Unlocking the Great Mysteries of Sex,” the Mass Media Bureau held that the material broadcast on that program was not patently offensive within the meaning of the statute because the program as a whole was a serious discussion of sex with people knowledgeable in the field. *Letter From Chief, Complaints and Investigation Branch, Enforcement Division, Mass Media Bureau to Gerald P. McAtee, 8210-EJS (issued October 26, 1989)*. See also *King Broadcasting Co. (King-TV)*, 5 FCC 2971 (1990) (broadcast of high school sex education class not indecent because material was clinical or instructional). Here, however, while parts of the broadcast handled the subject matter in a relatively serious manner, the comments and jokes by the on-air personalities quoted above cannot be characterized as educational, clinical or instructional. Rather, the only purpose of those jokes and comments appears to have been to pander and titillate.¹³ The excerpts at issue here are similar to other broadcasts found to be indecent or apparently indecent.¹⁴

12. Thus, we find that the material broadcast on WAZX, in context, was apparently patently offensive as measured by contemporary community standards. WAZX does not claim that the material was broadcast outside the 6 a.m. to 10 p.m. time frame relevant to an indecency determination. The exchange at issue was broadcast sometime after 8:15 a.m., when there was a reasonable risk that children may have been in the audience, and thus is legally actionable. For these reasons, we find that on April 6, 2001, WAZX-AM and WAZX-FM apparently violated the prohibitions in the Act and the Commission’s rules against broadcast indecency.

13. Section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80(a) of the Commission’s rules, 47 C.F.R. § 1.80, both state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the rules shall be liable for a forfeiture penalty. For purposes of section 503(b) of the Act, the term “willful” means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission’s rules.¹⁵ Based on the material before us, it appears that WAZX willfully violated 18 U.S.C. § 1464 and section 73.3999 of the Commission’s rules, by airing indecent programming on WAZX-AM and WAZX-FM.

¹² See *Citicasters Co. (KSJO(FM))*, 15 FCC Rcd 19095 (EB 2000), where the Enforcement Bureau rejected a claim by the licensee that the broadcast of a program on the proper technique for performing oral sex was not indecent because Dr. Terry, a sex therapist and certified clinical sexologist, was engaged in a clinical discussion of the subject. There, the Bureau found that the disc jockeys’ invitation to have Dr. Terry use a prop on a radio program, combined with their laughter and statements (such as “oh yeah, baby”) while she conducted the demonstration revealed that the material was intended to pander and titillate as opposed to facilitating a clinical discussion.

¹³ *Id.*

¹⁴ *Citicasters Co. (KSJO(FM))*, 15 FCC Rcd at 19091 (EB 2000) (“joke” that includes patently offensive references to incest and sex with children); *Tempe Radio, Inc. (KUPD-FM)*, 12 FCC Rcd 21828 (MMB 1997)(patently offensive language referring to sexual activity with a child); *EZ New Orleans, Inc. (WEZB(FM))*, 12 FCC Rcd 4147 (MMB 1997)(patently offensive references to incest and sexual activity with an infant).

¹⁵ See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

14. The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$7,000 for transmission of indecent/obscene materials.¹⁶ The *Forfeiture Policy Statement* also specifies that the Commission shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, 47 U.S.C. § 503(b)(2)(D), such as "the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁷

15. After reviewing all of the circumstances, we believe that a \$7,000 forfeiture is appropriate in this case for the apparent broadcast of indecent material.

IV. ORDERING CLAUSES

16. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311, and 1.80 of the Commission's rules,¹⁸ that GA-MEX Broadcasting, Inc., and WAZX-FM, Inc., are hereby NOTIFIED of their APPARENT LIABILITY FOR FORFEITURE in the amount of seven thousand dollars (\$7,000) for willfully violating 18 U.S.C. § 1464 and section 73.3999 of the Commission's rules.

17. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, WAZX SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

18. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment MUST INCLUDE the FCC Registration Number (FRN) referenced above, and also should note the NAL/Acct. No. referenced above.

19. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B443, Washington DC 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

20. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

21. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street,

¹⁶ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17113 (1997), *recon. denied* 15 FCC Rcd 303 (1999) (*Forfeiture Guidelines*); 47 C.F.R. § 1.80(b).

¹⁷ *Forfeiture Guidelines*, 12 FCC Rcd at 17110.

¹⁸ 47 C.F.R. §§ 0.111, 0.311 and 1.80.

S.W., Washington, D.C. 20554.¹⁹

22. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Javier Macias, President, WAZX-FM, Inc., and GA-MEX Broadcasting, Inc., 2460 N. Atlanta Rd., Smyrna, GA., 20080 and to WAXZ's counsel, Dan J. Alpert, 2120 N. 21st Rd., Suite 400, Arlington, VA. 22201.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁹ See 47 C.F.R. § 1.1914.